A & S COAL CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-582 Decided April 7, 1987

Petition for discretionary review of a decision of Administrative Law Judge Frederick A. Miller, affirming the issuance of notices of violation Nos. 80-2-40-35 and 81-2-40-2 and upholding civil penalties totaling $ 3,400.

Affirmed in part, vacated in part.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

   Under 43 CFR 4.1157, when an Administrative Law Judge in a civil penalty hearing finds a violation has occurred, he is to determine the amount of the penalty. He is not bound by the proposed assessment, regardless of whether an assessment conference has previously been held.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

   In a civil penalty proceeding OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. If that showing goes unrebutted, it will sustain the violation.

APPEARANCES: David Patrick, Esq., Harrodsburg, Kentucky, for appellant; Paul A. Molinar, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

A&S Coal Company, Inc. (A&S), has petitioned for discretionary review of a decision rendered on April 3, 1985, by Administrative Law Judge Frederick A. Miller. 1/ The decision affirmed the issuance of Notices of

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1/ By order dated May 23, 1985, this Board granted the A&S petition and allowed 30 days for the filing of a supporting brief. 43 CFR 4.1273.

Violation (NOV's) Nos. 80-2-40-35 and 81-2-40-2 and upheld the resulting civil penalty assessments totaling $ 3,400. 2/ In his decision, Judge Miller also held that whether an assessment conference had been conducted is not jurisdictional, and found the Office of Surface Mining Reclamation and Enforcement (OSM) had carried its burden by establishing a prima facie case, and proved the validity of the assessed penalties.

The disputed NOV's resulted from two inspections of the surface of appellant's Pleasant Run underground mine, located in Whitley County, Kentucky. OSM Inspector Aubrey J. Taylor inspected the site on July 9, 1980, and January 14, 1981, after notifying onsite representatives. The respective NOV's were served on the dates of inspection.

NOV No. 80-2-40-35 (Exh. R-1), issued on July 9, 1980, was served on Dan Frost. The NOV named A&S as the permittee and Frost Coal Co., Inc., as the operator. Of the original three violations listed on NOV No. 80-2-40-35, only violation No. 2 has been disputed by appellant. Violation No. 2 states: "silt basins are not constructed as specified in the approved mining plans" in violation of section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(3) (1982). After two extensions of time for abatement, a notice of termination of the NOV was issued on October 15, 1980 (Exh. R-7).

Taylor conducted a second inspection on January 14, 1981. The operator at the time was R. J. Utter Coal Company. NOV No. 81-2-40-2 (Exh. R-9) was served on Mrs. White, president of A&S, but she refused to acknowledge receipt by signing the document. Of the original five violations listed in NOV No. 81-2-40-2, only Nos. 4 and 5 are being contested.

Violation No. 4 stated "[t]he operator has in the course of mining operations disturbed off the permitted area" in violation of section 502(a) of SMCRA, 30 U.S.C. § 1252(a) (1982), and 30 CFR 710.11(a)(2). The corrective action called for was to cease mining on the unpermitted area and to obtain a revised permit which would include the off-permit area disturbed (Exh. R-9).

Violation No. 5 of NOV No. 81-2-40-2 was for: "The discharge from SS#1 [siltation structure number one] is in violation of effluent limitations" set forth in 30 CFR 717.17(a)(3). For abatement the NOV stated: "The permittee shall install operate, and maintain adequate facilities to treat any water discharged from the disturbed area that violates the effluent limitation" (Exh. R-9). After extension having been granted, violations Nos. 1, 2, 3, and 5, were abated on February 18, 1981 (Exh. R-13). Violation No. 4 was subject to further mine plan revision (Exh. R-15). On March 18, 1981, a notice of termination of the NOV was issued for violation No. 4 (Exh. R-14). 3/

- - - - - - - - - - - - - - - 2/ OSM issued the NOV's under its authority to enforce the Kentucky interim program. 30 U.S.C. §§ 1252, 1271 (1982). The Commonwealth of Kentucky obtained regulatory primacy on May 18, 1982. 47 FR 21434 (May 18, 1982).
3/ Additional information about the contested violations is presented later in this decision.

At the hearing, Mr. Pascual Raymond White testified he was the superintendent of A&S Coal Company (Tr. 94), and owned Whitley Development Company, which was strip mining a site adjacent to the A&S site. The two companies shared an access way. By letters dated March 3, 1981, and May 19, 1981, OSM proposed an assessment conference with Whitley Development for NOV No. 81-2-40-2, and the letters were addressed "Mr. Rosebud White" of the Whitley Development Corporation (Exhs. P-1 and P-3; Tr. 103). Copies of the assessment conference letters were forwarded to A&S Coal Company (Exhs. P-1, P-2, P-3). An assessment conference was held on June 3, 1981, with Mr. White in attendance. At this initial assessment conference NOV Nos. 81-2-40-2 and 80-2-40-35 were addressed, and the penalties were substantially reduced (Exh. R-18). 4/

Following the assessment conference A&S requested a hearing. The case was assigned to the Knoxville, Tennessee, Hearing Office, subsequently transferred to the Louisville, Kentucky, Hearing Office, and a hearing was scheduled for November 1, 1984. On that date, A&S and OSM agreed that another assessment conference should be held, and Judge Miller adjourned the hearing.

Mr. White and his counsel appeared at the scheduled assessment conference on January 3, 1985, but met with an unresponsive gentlemen who refused to discuss the matter, stating he lacked the authority to do so and he should not have been the person sent there to meet them (Tr. 5). A&S asserted that no records of this assessment conference are available.

Judge Miller reconvened the hearing on February 27, 1985. At the hearing, appellant objected to the lack of an assessment conference and OSM did not dispute the events as related by A&S. Judge Miller agreed that he had indeed called for the second assessment conference which had not been held (Tr. 5). However, Judge Miller decided to proceed with the hearing and address the issues, rather than delay the matter further. Following the hearing he found that the NOV's were proper and affirmed the civil penalties in the amounts set at the initial assessment conference. A&S then sought review by this Board.

A&S contends Judge Miller committed a number of reversible errors. A&S emphasizes that a 3-1/2-year delay between its request for a hearing and the date a hearing was held is an inordinate delay, and argues the delay denied it due process, as the opportunity to preserve evidence and site condition was altered in the interim. A&S states that at the second hearing Judge Miller should have instructed OSM to conduct the assessment conference, rather than proceeding with the hearing. A&S claims the original assessment conference was attributable to a different company and contends Mr. White was

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4/ At the initial assessment conference, penalties were reduced by the following amounts (see Exh. R-18):

	Violation	From	To
80-2-40-35	2	$1,900	$1,500
81-2-40-2	2	$1,100	-0-
	4	$1,300	$ 800
	5	$1,500	$1,100

not prepared to discuss the NOV's on behalf of A&S at that assessment conference.

A&S also contends there was insufficient evidence either of operations off its revised permit area or of inadequate siltation structures. A&S restates its initial contention that it was not A&S but the companies mining adjacent land who were responsible for the surface disturbance and stockpiled coal and equipment outside the perimeter of its permit. A&S argues it was unable to run independent effluent tests because it was not given notice of OSM's sampling. A&S also claims OSM did not properly track the chain of custody of its samples. In addition, A&S contends that, because the runoff from surrounding areas was more acidic than the effluent from the A&S operations, A&S caused no environmental damage and should be charged no penalty for its effluent.

In response, OSM asserts that petitioner was not prejudiced by the delay and this Board is the improper forum for constitutional due process arguments. OSM contends review by an administrative law judge is not contingent upon there having been an assessment conference and insists the civil penalties were correctly assessed. OSM asserts the effluent test results are admissible without clear evidence regarding chain of custody, noting its opinion that such questions affect the weight given to the evidence rather than admissibility, citing Darmac Coal Co., 74 IBLA 100 (1983). OSM insists that neither the SMCRA nor the regulations require OSM to notify operators of its effluent testing. OSM also defends its allocation of penalty points even though A&S did not contest the allocation of the penalty points in its statement of reasons.

[1] OSM's failure to have a representative at the second scheduled assessment conference (January 1985) is neither explained nor found to be excusable. OSM was directed to hold a conference by Judge Miller and the time and place for the conference was set by OSM. A&S argues that the lack of this assessment conference taints the results of the subsequent OSM penalty hearing. However, if the results were tainted, the taint would be on OSM not A&S. We find A&S has not demonstrated that it was prejudiced.

A&S stated that the regulations clearly provide for such a conference. 30 CFR 723.18 outlines procedures for conducting an assessment conference when the recipient of a NOV requests a conference within 15 days of receipt. The initial assessment conference in this case, held on June 3, 1981, resulted in a substantial reduction in penalties (see note 4). A&S has not urged Judge Miller or this Board to set aside the initial findings of conference and reinstate the previously set penalty amounts. If OSM were to do so, we would be compelled to deny that request.

In his decision Judge Miller stated he is not bound by a proposed assessment, even when an assessment conference has been held. Consolidation Coal Co., 5 IBSMA 6, 90 I.D. 49 (1983). See also Diamond Coal Co., 3 IBSMA 292, 88 I.D. 826 (1981). Judge Miller conducted a hearing during which both sides were given an opportunity to and did in fact submit evidence and testimony. Following this hearing Judge Miller did not adjust the assessment amounts either up or down, although to do so was within his authority. A&S correctly asserts a right to written, advance notice of the time, place, and

nature of review. See Cravat Coal Co., 2 IBSMA 136, 87 I.D. 308 (1980). However the initial conference was held, and A&S has not shown actual prejudice due to OSM's failure to appear at the second conference, especially in light of the hearing. Badger Coal Co., 2 IBSMA 147, 87 I.D. 319 (1980). We conclude Judge Miller properly exercised his jurisdiction when he held the hearing. 5/

A&S contends NOV No. 81-2-40-2 was not properly served. The information page for the A&S surface disturbance permit application lists Pascual White as the registered agent for and Sarah White as 50-percent owner and president of A&S Coal Company, Inc. (Tr. 24; Exh. R-8). Inspector Taylor personally delivered a copy of NOV No. 81-2-40-2 to Sarah White. Under 30 CFR 722.14(a), issuance of an NOV is complete when notice is personally served by physical tender to the appropriate person or actually or constructively received by such person by mail. Consolidation Coal Co., supra at 14, 90 I.D. at 53. The document was personally served on an officer and a principal owner of A&S at the home of the registered agent. Service was accomplished.

[2] A&S also challenges the validity of the cited violations. In civil penalty proceedings OSM has the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of violation and as to the amount of the penalty. 43 CFR 4.1155. OSM succeeds in making a prima facie case for a violation by the submission of evidence sufficient to establish the essential facts of the violation. If OSM's evidence is not rebutted, that evidence will sustain the violation. Tiger Corp., 4 IBSMA 202, 89 I.D. 622 (1982); James Moore, 1 IBSMA 216, 86 I.D. 369 (1979).

Silt Basin Construction

NOV No. 80-2-40-35, violation No. 2, was for construction of silt basins which did not conform to the approved mining plan, in violation of SMCRA, 30 U.S.C. § 1271(a)(3) (1982). Silt basins (siltation structures) are designed to contain and control the flow of minesite water in order to control sediment and other contaminants. The NOV called for reconstruction of the silt basins, but did not contain further details explaining how the structure had failed to conform to the mining plan.

At the hearing Taylor testified that silt basin No. 1 lacked adequate (5 feet) freeboard and had no emergency spillway (Tr. 13), and that the lack of emergency spillway and adequate freeboard created a risk of breach, which would result in the contents washing into the local creek system (Tr. 51). However, Taylor did not state how much freeboard existed at the time of his inspection and submitted no evidence with which this Board could independently make a determination. He testified that 5 feet of freeboard was necessary (Tr. 15), but the design specifications OSM offered in evidence

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5/ Nevertheless, OSM did not carry out the order Judge Miller issued. This is unacceptable procedure. Had A&S shown prejudice due to the lack of the second conference, the Board would be unable to affirm OSM's actions in this case.

only called for 1 foot of freeboard (Exh. R-4, Tr. 14). It is therefore possible that siltation structure No. 1 may have fulfilled the 1-foot design specification while still appearing inadequate to the inspector, who believed 5 feet to be necessary. In the absence of further explanation, we do not find that OSM established a prima facie case as to this aspect of violation No. 2 of NOV No. 80-2-40-35.

Taylor stated there was "virtually" no emergency spillway (Tr. 51). The proof of the existence or lack of a spillway is easily obtained, and testimony that one did not exist at the time of inspection is sufficient to create a prima facie case, even though, without collateral evidence, such as a photograph, the case is a weak one. We conclude OSM established its prima facie case as to this aspect of the violation.

A&S offered no evidence to counter the OSM allegation that there was no emergency spillway. Instead, A&S questioned the extent of the inspector's training as an engineer. A&S also objected to the loss of photographs and drawings Taylor said he took on the date of inspection and another occasion (Tr. 59). However, OSM established its case without photographic evidence. In its defense, the A&S witness testified that silt basin No. 1 had not been breached. However, the purpose of this regulatory scheme is to avoid hazardous conditions, not to wait for damage to occur. Consolidation Coal Co., 4 IBSMA 227, 89 I.D. 632 (1982); Avanti Mining Co., 4 IBSMA 101, 89 I.D. 378 (1982). We find that OSM has carried its ultimate burden as to this aspect of the violation, by a preponderance of the evidence. We find no evidence that the structure contained an emergency spillway and thus find A&S has not overcome the prima facie case by a preponderance of the evidence. Violation No. 2 of NOV No. 80-2-40-35 must be affirmed.

OSM also found appellant constructed siltation structure No. 2 in a manner other than that specified in the approved mining plan (Exh. R-1). At the hearing, OSM's case was based on the location, rather than the construction of siltation structure No. 2, and OSM did not submit mine plan specifications for the siltation structure as it did for siltation structure No. 1. 6/ Taylor testified that silt basin No. 2 was located off the permit area by 800 to 1,000 feet, that water flowed off the permit area prior to reaching this structure (Tr. 51) and the location of this structure was other than the location designated in the A&S mining permit plan in effect at the time of the July 9, 1980, inspection. Taylor admitted he did not locate perimeter markers but paced off the permit area to estimate its extent, using landmarks such as old orphan mine dumps and contours on the permit map (Tr. 59-61).

OSM submitted a map prepared by Resource Consultants, a firm employed by appellant, and dated January 21, 1980 (Exh. R-3). A triangle drawn by Taylor in pencil at the time of the hearing (Tr. 16) indicates the location of siltation structure No. 2 is over 400 feet from the eastern boundary of the permit area (Exh. R-3). Taylor claimed the operator simply erected a barrier across part of an old mining pit to create a siltation pond to catch

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6/ However, Exh. R-17, the mining plan amendment, contains the specifications for this structure.

drainage from disturbance near the eastern edge of the permit (Tr. 16). On appeal, A&S charges that OSM introduced neither evidence nor expert testimony to establish the method of construction of this silt basin at the hearing. However, A&S did not deny that siltation structure No. 2 was constructed at a site other than that designated in the mining plan and outside the permit area as it existed in July 1980.

It is evident that siltation structure No. 2 was far beyond the eastern boundary of the permit area as that area is designated in the map showing the permit area at the time of the inspection. This basin collected and discharged waste water which flowed from the permit area. A second revised mining plan was subsequently approved, and the map submitted as a part of the amendment shows siltation structure No. 2 within a substantially expanded permit boundary (Exh. R-16). OSM first received this final amendment on January 16, 1981, well after the NOV issued (Exh. R-17). Until the amendment, siltation structure No. 2 was not at the site shown in the mining plan and outside the permit perimeter (Tr. 84). Despite the contentions advanced by A&S that the inspector was too vague about location and distance, and that he was unaware of boundaries and the amended extent of the permit area, it appears that siltation structure No. 2 was a sufficient distance from the 1980 permit boundary to leave no question that the siltation structure was neither as designated in the mining plan nor within the permitted area. Therefore, we find neither silt basin to have been constructed in the manner set forth in the mine plan (Tr. 51, 59; Exh. R-4).

Mining Off Permit Area

In NOV No. 81-2-40-2, violation No. 4, issued January 14, 1981, BLM cited A&S for conducting mining operations off the permit area. The OSM inspector testified that he found surface disturbance, parked vehicles and equipment, stockpiled coal, and road use outside the permitted area. A&S asserts other companies mined adjacent areas and OSM did not tie the observed activities to appellant.

A&S claims Taylor did not know the amended permit boundaries at the time of the second inspection. White testified that Commonwealth inspectors had warned him of off-permit stockpiling in July or August 1980 but no citation was issued because it was determined the coal did not belong to A&S (Tr. 100). A&S claims stockpiled coal and equipment observed by Taylor also belonged to other companies (Tr. 109; SOR at 2; Supplemental SOR at 4).

Inspector Taylor testified that in his determination prior to issuance of the NOV he paced off the area, but he did not measure it with tape (Tr. 66). He felt this procedure was sufficiently accurate to determine that A&S was using an area outside its permit. Taylor testified as to his opinion the operator had mined off the permit and had stockpiled coal and stored equipment in an area outside the permit boundary (Tr. 27). At the hearing, he acknowledged that the original permit had been amended prior to issuance of the NOV and that the amendment had increased the permitted area to encompass off-permit disturbed land he had observed and cited during the 1980 inspection (Exh. R-10; Tr. 28). A map which was submitted with the third amendment to the permit (Exh. R-16) clearly shows the final boundaries. OSM received

this second revised map on January 16, 1981, 2 days after the second inspection.

The record does not indicate what attempt, if any, Taylor might have made to identify ownership of the vehicles and equipment. Taylor did not identify the type, amount, or ownership of the equipment in the NOV or during the hearing. Access road acreage can be attributable to more than one operator. See Kimberly Sue Coal Co., Inc., 74 IBLA 170 (1983). However, the permit designated the access road, and the access road was included as a part of the disturbed area for calculation of the bond amount. We must conclude that, while not marked on the map as being within the boundaries of the permit area, it was clearly marked and there is ample evidence of A&S's intent that it be a part of the permitted area. In addition, the inspector lost evidentiary photographs he had taken (Tr. 66), and presented no testimony or evidence linking the equipment or coal to A&S. 7/ After weighing the evidence we cannot find that OSM established a prima facie case as to violation No. 4 of NOV No. 81-2-40-2.

Effluent Levels

In violation No. 5 of NOV No. 81-2-40-2 OSM charged A&S with discharge of effluent from siltation structure No. 1 containing contaminants in excess of the effluent limits. Taylor conducted a Hach Kit test on the effluent from silt basin No. 1 during his 1981 inspection. A further sample was taken and was later analyzed by "Environmental Technology" (Exh. R-12) which found pH 3.43, 24.90 Mg/L Total Iron and 49.50 Mg/L Total Manganese. The inspector stated the effluent he tested and sampled drained from siltation structure No. 1 directly to Pleasant Run Creek and from there into Jellico Creek, a live tributary of the Upper Cumberland River. OSM charged A&S with discharging excessively acidic and mineralized effluent into Pleasant Run Creek. Taylor testified that he had checked contaminant levels in the water flowing from the discharge pipe from silt basin No. 1, using a field indicator test for water quality, known as a Hach Kit test. This test indicated the water violated effluent limitations (Tr. 27, 30, 34, 76). He then sent an effluent sample to a laboratory (Tr. 30; Exh. R-12). Taylor testified that the water tested was taken from the outflow pipe.

A&S states that the OSM inspector destroyed his test, lost photographic evidence of site conditions and location of testing, listed wrong violation numbers, and admitted an inability to differentiate between appellant's operations and the nearby operations of other companies. At the hearing, Mr. White stated that the sampled pond was almost dry on the date in question, as no fluid was being pumped from the mine. He also stated the sample taken by Taylor would therefore be from the pond itself, not the outflow pipe, as there was no discharge at the time of inspection (Supplemental SOR at 8; Tr. 106).

A&S claims evidence of the laboratory analysis is inadmissible. However, both the Hach Kit testing and laboratory analysis have been found

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7/ As the distance from a permit boundary increases it is reasonable that OSM should have a heavier initial burden of establishing responsibility for activities charged as off-permit mining.

admissible by this Board. The results of a Hach Kit test alone have been found sufficient to establish the fact of an effluent violation. D&D Mining Co., 4 IBSMA 113, 89 I.D. 409 (1982). Furthermore, in Darmac Coal Co., 74 IBLA at 103 (1983), this Board held that it was error for an Administrative Law Judge to exclude evidence of laboratory tests of water quality samples when a permittee had challenged that evidence only by asserting it was hearsay due to a failure to establish a chain of custody. See also Roberts Brothers Coal Co., Inc., 2 IBSMA 284, 294-95, 87 I.D. 439, 445 (1980). In Darmac, the water samples were also taken to confirm a prior Hach Kit test. Therefore, the laboratory analysis of water samples in this case is admissible. OSM established a prima facie case by testimony and evidence that the outflow from siltation structure No. 1 violated effluent limits. A&S rebutted the testimony by submitting testimony that the pond was not discharging effluent at the time of inspection but submitted no supporting evidence, such as pumping records or photographic evidence that there was in fact no discharge at that time. We find OSM had established a prima facie case which was not overcome by A&S.

Appellant also argues that no penalty should be assessed because no environmental damage would result from an outflow, given more seriously contaminated runoff from nearby areas. Mr. White maintains the effluent from the surrounding area was more acidic than the alleged effluent from the A&S siltation structure (Tr. 68). However, actual damage is not necessary to establish the fact of violation. See Amax Coal Co., 74 IBLA 48 (1983). The potential for additional harm to Jellico Creek was real (Tr. 50).

Although OSM defended its allocation of civil penalty points, A&S did not brief the Board on the merits of the civil penalty OSM assessed. We have reviewed the record and are satisfied that the assessments for those violations not vacated are, as modified by the initial conference, based on a reasonable calculation pursuant to the point system set forth in 30 CFR 723.13. See Avanti Mining Co., supra; Bell Coal Co., 81 IBLA 385 (1984). Accordingly, we do not revise the assessment of $ 1,500 for violation No. 2 of NOV No. 80-1-40-35, or the assessment of $ 1,100 for violation No. 5 of NOV No. 81-2-40-2.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed in part and vacated in part.

R. W. Mullen
Administrative Judge

We concur

C. Randall Grant, Jr. Administrative Judge

John H. Kelly Administrative Judge